

No. 76-412

Supreme Court, U. S.

FILED

NOV 11 1976

WILLIAM HODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

OREN F. POTITO AND HELEN M. POTITO, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-412

OREN F. POTITO AND HELEN M. POTITO, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners challenge the factual findings of the Tax Court with respect to seven separate issues. Upon a thorough review of the record, the court of appeals concluded that petitioners had received a "fair and impartial hearing" in the Tax Court, and that "[o]n the basis of taxpayer's inadequate evidence as applied to each of the issues individually considered below we cannot say that the Tax Court's resolution was clearly erroneous" (Court of Appeals op. 4217).¹ None of the factual questions warrants further review.

¹Although the findings of fact and opinion of the Tax Court and the opinion of the court of appeals are reproduced in the appendix to the petition, they have not been repaginated. Our references are therefore to the page numbers of the slip opinion of each court.

The pertinent facts are as follows: During the period 1963-1965, petitioner Oren F. Potito was the sole proprietor of Continental Engineering, an appliance and air conditioning repair service business. During those years, petitioner served as minister of the Church of Jesus Christ-Christian, and exercised exclusive dominion and control over the church funds. On audit of petitioners' returns for 1963-1965,² the Commissioner determined that petitioner Oren F. Potito had received several additional items of taxable income, and that his records failed to provide adequate support for any of the depreciation deductions or for a large portion of the business expense deductions claimed with respect to his repair service business (Tax Court op. 3-18).

1. Petitioners presented seven factual questions to the Tax Court (see Tax Court op. 2-3). The first issue was whether the amounts deposited in the bank account of petitioner's church constituted additional income taxable to petitioner. Although petitioner conceded that these amounts were includable in his taxable income, he contended that the deposits (1963—\$1000.68; 1964—\$2,702.65; and 1965—\$1,632.40) had already been included in the gross receipts reported on his returns.

The returns themselves, however, listed petitioner's repair service business as the sole source of his gross income. Moreover, the person who prepared petitioner's return testified that petitioner had advised her that his repair business was the only source of his income. Based on this evidence and petitioner's own failure to provide an adequate explanation for personal expenditures during these years in excess of reported income, the Tax Court properly found that petitioner had not reported the deposits in question (Tax Court op. 5-6, 7-8, 19).

²Petitioner Helen M. Potito filed a joint return with her husband only for 1965. Unless otherwise indicated, petitioner refers to Oren F. Potito.

2.a. The second and third issues involved the correctness of the Commissioner's determination that petitioner was taxable on sums placed at his disposal in 1963 by two of his parishioners, E.R. Whitman and his wife. The first sum (\$2,920) was furnished to petitioner for use in the development of a new type of automobile air conditioner. The Whitmans recovered \$1,300 in 1964 or 1965, but, according to the testimony of Mrs. Whitman, petitioner refused to account to them for his use of the balance of the fund. Petitioner testified that he had not used these funds for his own personal benefit, but produced no explanation of his actual expenditures from the account in which the \$2,920 had been deposited. Accordingly, the Tax Court concluded that petitioner had misappropriated \$1,620 to his own use, and should have reported that amount as income (Tax Court op. 11, 20-21).

The second sum (\$1,000) was furnished to petitioner by the Whitmans for the purchase of silver. Petitioner testified that he had in fact purchased this silver and delivered it to the Whitmans. Mrs. Whitman, however, testified that they had never received the silver for which the funds had been provided. There was accordingly ample basis for the Tax Court's conclusion that petitioner should have reported the \$1,000 in his income as well (Tax Court op. 12, 21).

b. The fourth issue was whether a boat, motor and trailer (valued at \$2,500), which petitioner received in 1964 from two other parishioners, represented a non-taxable gift, as petitioner contended, or taxable compensation for ministerial services, as the Commissioner determined. While petitioner asserted that this property was "just a gift" (Tr. 57), he did not present any evidence on whether the purported donors had acted out of disinterested generosity. See *Commissioner v. Duberstein*, 363 U.S. 278, 285-286. Accordingly, the Tax Court properly found that petitioner had failed to sustain his burden of proof on this question (Tax Court op. 12, 21-22).

c. The fifth and sixth issues involved the Commissioner's determinations with respect to allowable business expenses and depreciation petitioner claimed. After finding that petitioner's business records were themselves contradictory and "generally incomprehensible," the Tax Court concluded that he had failed to establish that he was entitled to business expense deductions in excess of those the Commissioner allowed (Tax Court op. 12-16, 22). With respect to the depreciation deductions claimed by petitioner, the Tax Court found that, except as to one item, petitioner had failed to establish his cost for the assets in question and that he had failed to establish the extent of his personal use, the useful life, or the salvage value of any of them. It therefore sustained the Commissioner's disallowance of the claimed depreciation deductions (Tax Court op. 17-18, 22-23).

d. The final issue was whether the Commissioner properly imposed the five percent negligence penalty under Section 6653(a) of the Code (26 U.S.C.). Since the Tax Court found that petitioner's records failed to support either the income reported or the deductions claimed on his returns for the years in issue (Tax Court op. 23-24), the negligence penalty was appropriate. See *Marcello v. Commissioner*, 380 F. 2d 499, 507 (C.A. 5).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1976.